

RECEIVED

DOCKET FILE COPY ORIGINAL

JAN 11 1993

Law Offices

Duncan, Weinberg, Miller & Pembroke, P. C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
California Office

WALLACE L. DUNCAN
EDWARD WEINBERG
JAMES D. PEMBROKE
RICHMOND F. ALLAN
ROBERT WEINBERG
JANICE L. LOWER
JEFFREY C. GENZER
THOMAS L. RUDEBUSCH *
MICHAEL R. POSTAR
CHARLES A. BRAUN °

SUITE 800
1615 M STREET, N.W.
WASHINGTON, D. C. 20036

(202) 467-6370

TELECOPY (202) 467-6379

DUNCAN, WEINBERG, MILLER & PEMBROKE
620 McCANDLESS TOWERS
3945 FREEDOM CIRCLE
SANTA CLARA, CALIFORNIA 95054
(408) 988-4404

Northeast Regional Office

2700 BELLEVUE AVENUE
SYRACUSE, NEW YORK 13219
(315) 471-1318
THOMAS J. LYNCH
OF COUNSEL

OF COUNSEL
FREDERICK L. MILLER, JR.
RICHARD K. PELZ†

January 11, 1993

† ADMITTED IN WASHINGTON ONLY
* ADMITTED IN WISCONSIN ONLY
° ADMITTED IN VIRGINIA ONLY

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Cable Television Consumer
Protection and Competition Act of 1992 -- Consumer
Protection and Customer Service, MM Docket 92-263

Dear Ms. Searcy:

Please find enclosed on behalf of the Municipal
Franchising Authorities, an original and nine (9) copies of
Comments.

Two other municipalities have also joined the Municipal
Franchising Authorities group, and we request that you include
their names as Commenters on the proposed rule. They are the
Town of Massena, New York, and the Village of Mayville, New York.

Any questions regarding the submission should be
referred to the undersigned.

Sincerely,

Janice L. Lower
Janice L. Lower
Michael R. Postar

Enclosures

No. of Copies rec'd
List A B C D E

249

RECEIVED

JAN 11 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 8)
of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-263

Consumer Protection and)
Customer Service)

TO: THE COMMISSION

COMMENTS OF THE
MUNICIPAL FRANCHISING AUTHORITIES

Town of Middletown, DE; City of Milford, DE; City of New Castle, DE; City of Seaford, DE; City of Auburn, IN; City of Columbia City, IN; City of Frankfort, NY; Lake Placid, NY; Little Valley, NY; City of Labbock, TX; and City of Azusa, CA; collectively, the Municipal Franchising Authorities ("MFA"), hereby submit their comments on the proposed rulemaking on customer service standards for cable operators.

I. INTRODUCTION.

The members of the MFA are all municipalities located in New York, California, and (your state will be inserted here), which have each issued franchises to cable operators to provide service in their municipal franchise territories. In the past, they have all experienced lack of satisfactory service of some kind from those operators, and

have found that, despite certain authority to enforce customer service requirements,^{1/} in practice, appropriate standards have been impossible to achieve unless they are a specific requirement of a franchise agreement, and very often not even then. Cognizant of their new authority and responsibility under the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"),^{2/} these cities and towns have the following comments on the issues raised by the Federal Communications Commission ("FCC" or "Commission") in its Notice of Proposed Rulemaking ("NPRM") adopted on December 10, 1992, and issued on December 11, 1992, in this docket. This NPRM will establish rules and minimum standards for customer service requirements.

II. DISCUSSION.

A. Provisions of the Cable Act of 1992.

Section 8 of the Cable Act, "Consumer Protection and Customer Service", amends existing law by providing, among other things, the following.

- 1) That a franchising authority may establish and enforce customer service requirements of the cable operator;
- 2) That the FCC will establish standards by which cable operators may fulfill their customer service requirements, which standards will include at a minimum:

1/ Pub. L. No. 98-549, Section 632, 98 Stat. 2780 (1984).

2/ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

--office hours and telephone answering conditions
--installation, outages, and service calls
--standards for billing and refunds;

- 3) A franchising authority or a State may still enforce a consumer protection law, as long as it is not preempted by this Act;
- 4) A franchising authority and an operator may agree to customer service requirements that are more stringent than those to be established by the FCC; and
- 5) A municipal law or regulation, or a State law, may impose customer service requirements that are more stringent or that address additional issues or requirements than the regulations imposed by the FCC as a result of this rulemaking.

As the Commission notes in its discussion, the terms of this section create a new but still partially ambiguous role for the Commission in what has heretofore been either a self-policing effort or a franchise-by-franchise series of standards. The MFA submits the following in response to the issues raised by the Commission.

B. Issues.

1. Are the Commission's customer service standards self-executing? If not, what action must a franchising authority undertake to impose the Commission's standards?^{3/}

The MFA submits that the minimum customer service standards should be self-executing, that is, once regulations setting forth those standards are promulgated by the FCC, then all cable operators should be on notice that, without waiver (see infra) or the imposition of more

3/ NPRM at 3, ¶ 4.

stringent standards, the FCC delineated standards will apply. This is necessary because not all franchising authorities will undertake to regulate the cable operator in their communities, and, unless the rules are deemed to be self-executing, there could be some lack of clarity about whether they would apply.^{4/}

If the Commission does not make the customer service regulations immediately applicable to all cable operators, MFA believes that FCC certification for the franchising authority to regulate should automatically make the standards applicable to its cable operator. The FCC's approval of the franchising authority's application could include a provision stating that all current federal customer service requirements are now applicable to the franchising authority's cable operators, thus putting the cable operators on specific notice of the minimum requirements. While this is clearly a second best approach, it would permit franchising authorities to establish and enforce the customer service requirements.

4/ Although the franchising authority is vested with the responsibility of enforcing the FCC's customer service standards, the FCC has a strong interest in ensuing application of the standards to all cable operators. The cost of customer service is one of the factors the FCC must consider in complaints filed by franchising authorities with the FCC. Section 623(c)(2)(D) and (E). The application of the FCC's customer service regulations to all cable systems also will enable the FCC to compare the costs of customer service for cable systems that are subject to effective competition and those that are not on a common basis, even when the franchising authority chooses not to regulate its franchise.

The Commission should not find that any action, other than applying for certification to regulate, is required of the franchising authorities to make the customer service standards applicable to their local cable operators. If the requirements are not self-executing, and if each franchising authority must take some action in order to officially make the standards applicable in the community, a Pandora's box is opened. Each city or town would need to determine whether to pass a law or ordinance, would need to go through all of the required procedures, and would expend time, energy and resources just to put a local stamp on a federal action. This is clearly not what Congress intended. Moreover, should two franchising authorities take different approaches to the same operator, there is a risk of a court challenge. Where one franchise is issued by two entities which have joined together for that purpose (e.g., a village located wholly within a township), then each would need to undertake to pass the appropriate law or ordinance in harmony with each other, or risk a challenge from the operator. For these reasons, the requirements established by the FCC should be self-executing.

Should a franchising authority wish to enact more stringent requirements, it will do so under state or local authority, which will necessitate that the city or town government pass local legislation or issue regulations. This seems fair and not burdensome, and indeed required

under the Act. In such event, no federal action is required for the franchising authority to impose stricter standards.

2. May local franchising authorities adopt standards that fall below the minimum federal standard? Are waivers required? When?^{5/}

Yes. Because the individual circumstances of each locality cannot be predicted, there should be an opportunity for a franchising authority to adopt service standards that fall below the minimum federal standards. However, because the MFA believes that the federal standards themselves are self-executing, the FCC's rules should provide for the franchising authority to request and the FCC to order waivers. Only the franchising authority should be permitted to make such request for waiver. Waivers should be permitted, since the requests will come from the franchising authority and not the operator, and so the party for whom the protection of the Cable Act of 1992 is intended, the cable consumers, knowingly and willingly will be asking for a relaxation of that protection. Similarly, a franchising authority's request to reinstate the FCC minimum standards should receive prompt, favorable, Commission action.

There are three important reasons that waivers of the customer service standards should be available. First, waivers may be based on a variety of local circumstances, such as impossibility, excessive cost under the circumstances, or reasonableness due to a small number of

5/ NPRM at 4, n. 9.

subscribers. Second, a franchising authority with satisfactory customer service requirements incorporated in local law, or in the franchise, should not have to commit significant resources to retain the status quo or implement standards it believes are unnecessary. Third, waivers will allow the FCC to adopt stricter standards than it might otherwise be willing to adopt. If the Commission designs customer service standards that aim for the "lowest common denominator" it will adopt standards that are too low for many localities. With a waiver option, the Commission should feel confident that it can adopt the strict standards Congress intended without burdening cable systems that have not experienced the problems the Cable Act of 1992 seeks to remedy. In sum, waivers serve at least two important purposes: limiting the burden on cable systems and allowing the FCC to adopt more stringent standards. This is clearly consistent with the intent of Congress.

The FCC should ensure that cable operators not be able to influence unreasonably the franchising authority to seek a waiver from the customer service standards. This concern should be greatest where the power of the cable operator and the franchising authority are unequal. MFA suggests that a corollary to a waiver provision is an automatic right to reinstate the FCC minimum standards. This will help to equalize the relative positions of the cable operators and the franchising authority and will help to ensure that the intent of Congress to provide a tool to

improve cable service will be met. Any time a franchising authority determines that its standards are not resulting in adequate customer service, the authority would have the right to return quickly and easily to the FCC's customer service umbrella.

Although Section 8 does not expressly provide for waiver, it is consistent with the purpose of this section. This is particularly true if one considers that it is the franchising activity, not the FCC that is directly authorized to enforce the customer service standard. Since the objective of Section 8 is to improve service, it is inconsistent with that purpose to find that Congress intended to offer franchising authorities the "Hobson's Choice" of accepting unwanted customer service standards by choosing to regulate or forcing the franchising authority to forego regulating its cable operator to avoid unwanted standards. A better approach is to allow for waivers upon request by the franchising authority.

To limit the burden on the Commission, applications for waivers or reinstatement of the FCC's standards can be made self-executing after a minimal notice period of 30-60 days.

3. Does the FCC correctly interpret the Act to permit a franchising authority to impose the customer service requirements at any time?^{6/}

Yes. Particularly since we believe that the requirements are self-executing, the cable operator will be on notice that the requirements are applicable from the date that the Commission issues its final regulations.

Since Section 8, unlike the comparable provisions of the 1984 Act (47 U.S.C. § 552), contains no limitation on when the customer service provisions may be imposed, and absent any intent by Congress to limit the application of the FCC's standards, they should become applicable when issued. Were the Commission to decide that the customer service standards could be made applicable only on the occasion of a franchise renewal, many of which are several years away, the teeth of this provision would be knocked out, a result that Congress could not have intended.

The FCC standards will preempt any customer service terms in existing franchise or local law that fall below the minimum federal standard. Should the franchising authority seek more stringent standards, it may do so at any time, to the extent permitted by state and local law. Any existing local customer service standards that exceed the federal standards are not affected by the FCC's regulations implementing Section 8 of the Cable Act of 1992. Congress did not intend to occupy the field to the exclusion of local

6/ NPRM at 4, ¶ 6.

regulation. Rather, it intended to supplement the authority of franchising authorities.

4. Will the Commission's standards supersede those in local franchises?^{7/}

As explained immediately above, the MFA believes that to the extent that the FCC's standards are more stringent than those in existing local franchises, they will supersede the existing standards. Any other conclusion would largely limit the effect of the FCC's customer service standards, an intent not reflective of the legislative history.

5. Should the service standards in existing franchises be grandfathered?^{8/}

The MFA believes that service standards that are not as high as the standards required by the FCC's regulations are preempted and thus cannot be grandfathered. There is no authority in the Cable Act of 1992 to grandfather either local law or franchise standards that fall below the customer service standards determined by the FCC. However, by permitting the franchising authority to seek a waiver of the FCC standards, the FCC will be able to tailor its service requirements to local needs.

Clearly, existing service standards are not preempted where they meet or exceed the standards set forth in the FCC's regulations. Since subsection (C)(2) of

7/ NPRM at 4, ¶ 7.

8/ NPRM at 4, ¶ 7.

Section 8 of the Cable Act of 1992 specifically recognizes the ability of a franchising authority and a cable operator to agree to customer service standards that are more stringent than the standards that will be promulgated by the Commission, it would make no sense to terminate standards that are more stringent simply because they have been agreed to, or ordered, before the effective date of the Cable Act of 1992.

6. Should the Commission have any role with regard to customer service obligations once its standards are adopted?^{9/}

At a minimum, the FCC should monitor the quality of cable service nationally to determine if its regulations are achieving the objectives of Congress in adopting Section 8. This will enable the FCC to revise its standards as necessary to achieve the intent of Congress, and, as appropriate, to report to Congress on the need for additional legislation respecting customer service.

7. Does the Act provide the franchising authority with the authority to enforce the customer service standards?^{10/}

Of course. There was near unanimity during the debates that customer service in the cable industry was a major concern voiced to Senators and Representatives. Members on both sides of the aisle and on both sides of the legislation expressed concern with the quality of cable

^{9/} NPRM at 4, ¶ 7.

^{10/} NPRM at 6, n. 19.

service. Given the bipartisan concern with this issue, it is inconceivable that Congress did not intend for franchising authorities to have the right to enforce compliance with the customer service standards.

Section 632(a) states that "A franchising authority may establish and enforce - (1) customer service requirements...." This language is sufficient to authorize the franchising authorities to enforce the customer service standards on their cable operator. The lack of an express mechanism for enforcement is no surprise, since implementation was left to the franchising authority. That is not to say that the franchising authority is left without the power to compel compliance.

The franchising authority should be able to compel compliance in a number of different ways that are not dependent upon the terms of the franchise. Customer service should be reflected in the rates that the cable operator may charge for basic tier service and for equipment. The franchising authority may also make the level of charges for services, such as installation or repairs, dependent upon the cable operator meeting the standards adopted by the FCC. The franchising authority may also seek a court order compelling compliance with the FCC's standards. In addition, the franchising authority may use the cable operator's compliance with the FCC's standards as a benchmark for determining the fitness of the franchisee to continue to operate under a renewal of its franchise.

Finally, under the 1984 Act, customer service requirements included in the franchise are enforceable against the cable operator. There will be other means to enforce compliance as well. Clearly, remedies for violations of the customer service standards will not be limited to franchise renewals.

8. Should the FCC exempt all small cable systems from the customer service requirements of the Cable Act of 1992?^{11/}

The Cable Act of 1992 does not provide for a blanket exemption from the customer service standards for smaller cable systems and none should be granted automatically in the FCC's rules. Congress was concerned, however, with the cost of implementing the Act. It expressly recognized the burdens on small systems under the rate regulation section. See Section 623(i). The MFA believes that the best way to resolve this concern is by permitting waiver of the customer service standards upon an appropriate application by a franchising authority. This would make the new standard available to smaller systems immediately to improve customer service. It would also allow franchising authorities with smaller cable systems that found the cost of such standards burdensome or the extent or the stringency of the standards unnecessary to apply to the FCC for a waiver.

The FCC should not grant a blanket waiver in its rules. Such a waiver would once again burden smaller municipalities with the need to justify the same quality of

^{11/} NPRM at 6, n. 21, and at 7, paragraph 13 (A).

service standards that are available to larger municipalities. It would also give the cable operator power that Congress did not intend. A blanket waiver does not serve the purposes of the Act and is inferior to a case-specific review of any requests for waiver. A limited waiver that might better serve a particular locality is superior to a broad waiver for all smaller systems. In many cases, it is the smaller cable system operator that most needs to be held to the new customer service standards.

9. How should the FCC define "normal operating hours"?^{12/}

The Commission should define "normal operating hours" as a minimum of any eight hours each weekday between the hours of 7:00 a.m. and 7:00 p.m. and four hours on either Saturday or Sunday. This definition partially addresses the need to make cable service available to subscribers who work Monday through Friday. The concern with the office hours that cable operators maintain is not limited to larger systems. The Village of Mayville, New York, which has 611 subscribers served by US Cable, believes that Saturday hours are needed to make its operator available to subscribers that work weekdays.

^{12/} NPRM at 7, paragraph 12.

10. What service standards and incentives will promote good quality installation and repair service calls?^{13/}

Members of the MFA agree that the quality of installation and service calls is generally in need of improvement. For example, the City of Columbia City, Indiana is concerned with the failure of its cable operator to complete burial of new installation in an expedient manner. In addition, cable service is not always extended in a prompt manner to new areas of residential development. Others are concerned that the response time to requests to improve picture quality should be shorter. The Act provides the FCC with two important tools to improve service calls. First, Congress directed the FCC to issue standards respecting service calls. The FCC should issue regulations that establish an acceptable level of service quality. For example, customers with a service call appointment that the cable operator cannot meet on time should be notified no later than thirty minutes after the appointment time. Appointments should be made with a maximum of a two hour "window", rather than the half-day or even full day "window" that often exists now.

Second, the FCC should make clear that cable operators need not be compensated for inferior service. Any system that fails to rectify problems promptly should not receive full payment for service during the duration of the

^{13/} NPRM at 7-8, paragraph 14.

problem. Similarly, the cost of service calls that are not made on time should be discounted.

The combination of clear regulations and a financial incentive to perform should have a positive effect on service.

11. Will a single benchmark customer service regulation meet the needs of all cable subscribers?^{14/}

Congress sought to improve the quality of cable service throughout the country, not just in larger cities. There is no specific customer service exclusion for smaller cable systems. To improve customer service in smaller communities, the same standards that the FCC adopts for larger cities should apply. A single benchmark customer service standard will best serve the purpose of the Cable Act of 1992.

Quality of service should not be a matter of negotiation between the cable operator and the franchising authority. Cable operators will be obligated to comply with the FCC's customer service rules when directed to do so by the FCC or the franchising authority without the need of negotiations.

12. Should the FCC adopt lower standards at the outset and increase those standards at specified intervals?^{15/}

Absolutely, categorically, no! The only way the service provided by cable operators is going to improve is

^{14/} NPRM at 9, paragraph 18.

^{15/} NPRM at 10, paragraph 19.

if the FCC adopts strong and clear standards. Adopting weaker standards initially will only lengthen the time it will take to achieve the improvement in the quality of service that Congress intended. The Commission can always revisit its rules to strengthen them if experience proves that to be appropriate. It should not even consider adopting an increasing scale of service. Nor would that be consistent with the intent of Congress. A scale of any kind would only frustrate the objective of quickly improving customer service.

III. CONCLUSION

The Municipal Franchising Authorities urge the FCC to issue consumer service and consumer protection regulations that:

- 1) Apply the FCC standards to all cable operators immediately upon issuance;
- 2) Allow franchising authorities to seek waiver of the customer service standards;
- 3) Does not grandfather existing franchise customer service requirements that fall below the FCC's standard;
- 4) Find that Section 8 of the Cable Act of 1992 provides the franchising authorities with the authority to enforce the customer service standards;
- 5) Does not grant a blanket exemption to all smaller cable operators;

- 6) Clearly defines the standards of reasonable customer service;
- 7) Adopts a single benchmark standard; and
- 8) Rejects the concept of initially adopting lower standards.

By adopting customer service standards that reflect these principles, the MFA submits the FCC will satisfy the purposes and intent of Congress in enacting Section 8 of the Cable Act of 1992.

Dated: January 11, 1993

Respectfully submitted,



Janice L. Lower
Michael R. Postar
Duncan, Weinberg, Miller
& Pembroke, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

on behalf of

Municipal Franchising
Authorities